

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANDREW DORCHY,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 263104

Oakland Circuit Court

LC No. 98-160800-FC

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order granting the prosecution's motion in limine to admit the transcripts of defendant's 1998 trial testimony in his retrial for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

This case arises out of the January 10, 1996, shooting death of Larry Adams. Defendant was apprehended in January 1998 and charged with the first-degree premeditated murder of Adams, assault with intent to murder Deon McCrary,¹ MCL 750.83, two counts of felony-firearm, and being a felon in possession of a firearm, MCL 750.224f. At his December 1998 trial, defendant argued that he shot Adams in self-defense. The jury rejected defendant's version of the events and convicted him of first-degree premeditated murder and one count of felony-firearm. Defendant pleaded guilty to being a felon in possession of a firearm. Defendant was sentenced to concurrent prison terms of mandatory life for the first-degree murder conviction and 2 to 7 ½ years for the felon in possession of a firearm conviction, and a consecutive two-year term for the felony-firearm conviction. This Court affirmed defendant's convictions and sentence, *People v Dorchy*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2001 (Docket No. 217665), and our Supreme Court denied defendant's delayed application for leave to appeal, *People v Dorchy*, 466 Mich 856; 643 NW2d 575 (2002).

On November 26, 2002, defendant filed a petition for a writ of habeas corpus in federal district court, asserting, among other things, that his Sixth Amendment right to confront the

¹ We note that the lower court transcripts from defendant's first trial refer to this witness as Dion McCrary.

witnesses against him was violated when the testimony of Ernest Knox from the trial of codefendant Damian Martin and the police statement by McCrary were admitted into evidence.² The federal district court agreed and granted a conditional writ on May 26, 2004. *Dorchy v Jones*, 320 F Supp 2d 564, 581 (ED Mich, 2004). The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the federal district court on February 23, 2005. *Dorchy v Jones*, 398 F3d 783 (CA 6, 2005).

After the federal district court granted defendant's petition, plaintiff initiated new proceedings against defendant. On May 20, 2005, plaintiff filed a motion in limine requesting the admission of defendant's 1998 trial testimony. On June 1, 2005, the trial court granted plaintiff's motion and defendant appealed to this Court by leave granted. *People v Dorchy*, unpublished order of the Court of Appeals, entered June 16, 2005 (Docket No. 263104).

In his sole argument on appeal, defendant contends that the admission of his testimony from his previous trial violates his Fifth Amendment right to remain silent under the rule stated in *Harrison v United States*, 392 US 219; 88 S Ct 2008; 20 L Ed 2d 1047 (1968).³ Consequently, defendant concludes, the trial court erred when it granted plaintiff's motion in limine. We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, this Court reviews de novo questions of law, such as whether a rule of evidence or statute precludes the admission of the evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

In *Harrison*, the defendant was originally tried on a charge of felony murder. At his first trial, the prosecution introduced three confessions allegedly made by defendant while in police custody. After the admission of these confessions, the defendant took the stand and testified to his own version of the events. The jury found the defendant guilty, but the Court of Appeals reversed his conviction after determining that the confessions admitted at trial had been illegally obtained. *Harrison, supra* at 220. At a second trial, the prosecution did not admit defendant's confessions into evidence, but did read into evidence the defendant's testimony from his first trial. A jury again convicted the defendant and the Court of Appeals affirmed. *Id.* at 221.

In deciding whether the testimony from the defendant's first trial was properly admitted against the defendant at his second trial, the United States Supreme Court noted that it did not "question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings." *Id.* at 222. The Court explained,

² Knox and McCrary witnessed Adams' death.

³ The Fifth Amendment to the Constitution of the United States "provides that no 'person . . . shall be compelled in any criminal case to be a witness against himself.'" *Pennsylvania v Muniz*, 496 US 582, 588; 110 S Ct 2638; 110 L Ed 2d 528 (1990). The Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Id.*, citing *Malloy v Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. [*Id.*]

However, after recognizing the general admissibility of a defendant's former testimony, the Court proceeded to carve out a narrow exception. The Court noted,

Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby – the fruit of the poisonous tree, to invoke a time-worn metaphor. . . . [*Id.*]

Because the confessions had been illegally obtained, the Court determined that the relevant question was no longer whether the defendant made a knowing decision to testify, but rather centered on his motivation in choosing to testify. *Id.* at 223. The Court held that, if the defendant testified “in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.” *Id.* After stating the general rule, the Court determined that the Government failed to demonstrate that the defendant's decision to testify at his first trial was not motivated by the introduction of the illegally obtained confessions and, therefore, reversed the defendant's conviction. *Id.* at 224-226.

In the present case, the statements of Knox and McCrary were admitted against defendant during his first trial. Because Knox could not be located for defendant's trial, his testimony from codefendant Martin's trial was read into evidence. At codefendant Martin's trial, Knox testified that defendant pulled out a gun and shot Adams in the back of his head three times. Knox also stated that Adams never pulled out a gun and that his hands were in his pocket when defendant shot him. On cross-examination, Knox further testified that, while Adams was angry with defendant over a \$10,000 drug debt, he (Knox) heard Adams tell defendant over the phone that his life was not in danger. Unlike Knox, McCrary was physically present at defendant's trial but told the court out of the presence of the jury that he would assert his Fifth Amendment right not to testify, if called as a witness. Thereafter, the trial court permitted plaintiff to play McCrary's taped statement to the police wherein he stated that he saw defendant shoot Adams in the head three times.

While there was evidence other than these statements that connected defendant to Adams' death, there was little evidence to support plaintiff's theory that defendant committed first-degree premeditated murder or to rebut defendant's self-defense theory. Therefore, it is unlikely that defendant was induced to take the witness stand on the strength of the other evidence against him. *Harrison, supra* at 222, 225-226. Furthermore, as already noted, the federal district court determined that these statements were admitted in violation of defendant's Sixth Amendment right to confront the witnesses against him. *Dorchy v Jones*, 320 F Supp 2d 564, 571-577 (ED Mich, 2004) Consequently, if the erroneous admission of these statements is the type of evidentiary admission contemplated under the exception stated in *Harrison*, we would have to conclude that defendant's prior testimony is inadmissible at his new trial.

In *People v Armentero*, 148 Mich App 120, 126; 384 NW2d 98 (1986), this Court determined that application of the *Harrison* exception depended on whether the testimony was impelled by the admission of “illegal” evidence. According to the Court in *Armentero*, evidence is illegal for purposes of the exception in *Harrison* when the evidence infringes on a basic constitutional value or, due to its inherent unreliability, the evidence threatens the credibility of the verdict. *Id.* at 126-127. The Court in *Armentero* explained,

By defining “illegal” evidence in this way, the application of the *Harrison* exception is not restricted to situations where police misconduct has produced the evidence that impels defendant’s prior testimony. Such a narrow limitation of *Harrison* to the traditional “fruits of the poisonous tree” doctrine is not warranted and is unnecessary for a decision in this case. *Harrison* is only limited to situations where the evidence impelling a defendant’s prior testimony is illegal in the sense that it infringes upon basic constitutional values or, to put it another way, upon a defendant’s right to a fair trial. Only when evidence is “illegal” in this sense is a defendant’s Fifth Amendment right to remain silent infringed upon when he is impelled to testify in response to the admission of the evidence. Evidence which impels a defendant to testify, even though technically inadmissible due to general policies of state statutory or common law, is “legal” evidence for the *Harrison* exception if it does not infringe upon basic constitutional values or present a situation where the result is likely to rest upon inherently unreliable evidence. [*Id.* at 127.]

Other courts have held that the exception in *Harrison* applies only to situations where a defendant’s testimony at the former trial was compelled by evidence that was both illegally obtained and improperly admitted. *United States v Gianakos*, 415 F3d 912, 919 (CA 8, 2005); *United States v Mortensen*, 860 F2d 948, 951 (CA 9, 1988); *State ex rel Mazurek v District Court of 20th Judicial District*, 302 Mont 39; 22 P3d 166, 170 (2000), citing *United States v Bohle*, 475 F2d 872, 875-876 (CA 2, 1973); *Patton v United States*, 688 A2d 408, 411 (DC App, 1997); *State v Hunt*, 339 NC 622; 457 SE2d 276, 285 (1994); *Towe v State*, 304 Ark 239; 801 SW2d 42, 43 (1990); *State ex rel LaSota v Corcoran*, 119 Ariz 573; 583 P2d 229, 237-238 (1978). Indeed, the Court in *Mazurek* specifically declined to adopt the analysis of *Armentero*. *Mazurek, supra* at 172. Instead, the Court determined that the rule in *Harrison* should be limited to “those situations where the evidence compelling a defendant’s testimony was illegally obtained through unconstitutional law enforcement conduct.” *Id.* The Court explained,

This limitation on *Harrison*’s applicability is appropriate. The Supreme Court’s holding that prior testimony is inadmissible in a later proceeding only when it was compelled by the admission of evidence both illegally obtained and improperly admitted was based on application of the exclusionary rule which requires suppression of any evidence which emanates from underlying evidence which is obtained in violation of a defendant’s constitutional rights. The Supreme Court’s *Harrison* holding having been based on the “fruits of the poisonous tree” doctrine, we conclude that *Harrison* is properly limited to that application. [*Id.* at 172-173 (citation omitted).]

We agree that the exception stated in *Harrison* is properly limited to situations involving the admission of evidence that was both illegally obtained and improperly admitted. The

Supreme Court founded the exception stated in *Harrison* on the “fruit of the poisonous tree” doctrine, which seeks to deter the police from engaging in future illegal conduct by denying them its past benefits. *Harrison, supra* at 231 (White, J., dissenting), citing *Linkletter v Walker*, 381 US 618, 634-639; 85 S Ct 1731, 1740-1743; 14 L Ed 2d 601 (1965). This purpose is not served by barring the use of testimony induced by the admission of evidence, which, although later determined to be inadmissible, was lawfully procured and properly offered into evidence on a good faith belief in its admissibility. Therefore, because we are not bound by *Armentero*, see MCR 7.215(J)(1), we hold that the exception stated in *Harrison* properly applies to a defendant’s prior testimony where that testimony was compelled by the admission of evidence that was both illegally obtained and improperly admitted. While defendant’s testimony was likely induced by the erroneous admission of the statements by Knox and McCrary, those statements were not the product of illegal conduct on the part of law enforcement personnel. Therefore, the trial court did not err when it determined that defendant’s prior testimony was admissible.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra